[Cite as *State v. Mays*, 2010-Ohio-3289.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 09AP-942 (C.P.C. No. 08CR-05-3556)
Randy J. Mays,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on July 13, 2010

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellant.

R. William Meeks and *David H. Thomas*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, P.J.

{¶1} Plaintiff-appellant, the State of Ohio, appeals the judgment of the Franklin County Court of Common Pleas, which granted a motion to suppress filed by defendant-appellee, Randy J. Mays. For the following reasons, we affirm the trial court's judgment.

{¶2} Two Franklin County Sheriff Deputies stopped appellee for a traffic violation. They placed him in the backseat of the patrol car while they processed the ticket. Because appellee was cooperating, the deputies did not handcuff him or draw

their weapons, and they kept the door open to the backseat of the patrol car. The deputies gathered information about appellee, who volunteered that he went to college and is now an auditor. Within ten minutes of the stop, while waiting to obtain driver's license information, one deputy asked appellee if he had anything illegal in his car. Appellee said no. The deputy asked to search the car, and appellee repeated that there was nothing illegal in it. The deputy asked, "[i]s that a yes?" and appellee said, "[i]f that's what you guys want to do." (Exhibit A at 15:04:08-12.) Appellee did not protest while the deputies searched the car. After they found marijuana in the trunk, they placed him under arrest. He answered the deputies' questions throughout the traffic stop, even after being informed of his *Miranda* rights upon his arrest. They found him in possession of heroin and methamphetamine during searches after his arrest.

{¶3} A grand jury indicted appellee on three counts of drug possession. He filed a motion to suppress evidence stemming from the car search, claiming that the search was unconstitutional. Appellant argued that the search was lawful because appellee voluntarily consented to it. The court suppressed the evidence, concluding that appellee did not "unequivocally, specifically and intelligently" consent. The court explained that the deputies were not permitted to infer consent and that they instead needed to "obtain clear consent" for the search. The court said that appellee's response to the search request was "confusing and ambiguous" and that the deputies should have repeated the question, " 'is that a yes,' " after he answered, "if that's what you guys want to do."

{¶4} Appellant appeals, raising the following assignment of error:

> THE TRIAL COURT ERRED WHEN IT GRANTED THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

SEIZED DURING A CONSENSUAL SEARCH OF THE DEFENDANT'S VEHICLE.

{¶5} In its single assignment of error, appellant argues that the trial court erred by granting appellee's motion to suppress. We disagree.

{¶6} When presented with a motion to suppress, the trial court assumes the role of the trier of fact. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. Thus, the trial court is in the best position to resolve questions of fact and evaluate witness credibility. *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, ¶41, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. On review, we must accept the trial court's factual findings if they are supported by competent, credible evidence. *State v. Stokes*, 10th Dist. No. 07AP-960, 2008-Ohio-5222, ¶7. Accepting those facts as true, we must then independently determine, as a matter of law and without deference to the trial court's conclusion, whether the court applied the correct law and whether the facts meet the applicable legal standard. *State v. Luke*, 10th Dist. No. 05AP-371, 2006-Ohio-2306, ¶12-13.

{¶7} Appellee claimed in his motion to suppress that the car search violated the Fourth Amendment to the United States Constitution. Appellant, by contrast, contended that by consenting to the search, appellee waived this constitutional protection. See *State v. Barnes* (1986), 25 Ohio St.3d 203, 208. Appellant had the burden to show by " 'clear and positive' " evidence that consent was " 'freely and voluntarily' " given. *State v. Posey* (1988), 40 Ohio St.3d 420, 427, quoting *Bumper v. North Carolina* (1968), 391 U.S. 543, 548, 88 S.Ct. 1788, 1793. Where consent is not explicitly given, it can, "on occasion," be implied from the defendant's conduct and by the circumstances surrounding the search, but "[t]his burden is even heavier where voluntary consent was

not explicitly given." *State v. Holsinger* (Oct. 10, 2000), 10th Dist. No. 00AP-216; see also *State v. Lane,* 2d Dist. No. 21501, 2006-Ohio-6830, ¶40. Mere acquiescence to law enforcement is not voluntary consent, however. *Bumper*, 391 U.S. at 548-49, 88 S.Ct. at 1792.

{¶8} The State thus has the burden to show (1) whether defendant in fact gave "consent" to the deputies to search his car and (2) if he gave consent, whether it was given "freely and voluntarily" and not as the result of duress or coercion, express or implied. The two concepts are distinct but related. See *State v. Lattimore,* 10th Dist. No. 03AP-467, 2003-Ohio-6829; *United States v. Worley* (C.A.6, 1999), 193 F.3d 380. Whether a person gave consent to search and whether that consent was voluntary are questions of fact. *Lattimore* at ¶8-9.

{¶9} *Lattimore* addressed both concepts. In *Lattimore*, the trial court determined that the defendant's testimony was inconsistent on the issue of consent and found the police officer's testimony credible that the officer asked for and received defendant's consent to search. On appeal, this court reviewed defendant's testimony on the issue of consent, found it to be "somewhat imprecise," but affirmed the trial court's ruling that the defendant did give consent to be searched. Id. at ¶8. Then, "[h]aving determined that the trial court did not err in finding appellant consented to be searched, [this court] next determine[d] whether all of the surrounding circumstances and procedures used by the police in gaining that consent were consistent with appellant's constitutional rights," that is, with the voluntariness of the consent defendant gave. Id. at ¶9. Observing that "the trial court never made any determination as to the voluntariness of appellant's consent," Id. at ¶10, this court applied various factors and

proceeded to make its own determination as to whether defendant's consent was "freely and voluntarily given." Id. at ¶14-17. This court ultimately concluded that defendant "consented to the search" and his consent was not coerced, but was voluntary.

{¶10} Similarly, the Sixth Circuit's decision in *Worley,* referenced in the trial court's decision and involving facts very similar to the instant case, examined the "voluntariness" of the defendant's consent and then examined his "statement" that the government relied upon to establish "consent" to the subject search. Upon applying the factors to determine whether defendant made the statement voluntarily, the Sixth Circuit "agree[d] with the government that there was no evidence of overt duress or coercion" in the case. Id.

{¶11} The Sixth Circuit, however, did not end its inquiry there. Id. The Sixth Circuit stated that "[w]here the government purports to rely on a defendant's statement" to establish valid and voluntary consent, courts must also examine the content of that statement to ensure that it "unequivocally, specifically, and intelligently" indicates that the defendant consented. Worley at 386, citing *United States v. Tillman* (C.A.6, 1992), 963 F.2d 137, 143. The Sixth Circuit thus concluded the government, "in meeting its burden * * * must also establish that Worley's statement 'You've got the badge, I guess you can' [in response to officer's request to look in Worley's bag] was an unequivocal statement of free and voluntary consent, not merely a response conveying an expression of futility in resistance to authority or acquiescing in the officers' request." *Worley* at 386. The Sixth Circuit concluded "the district court did not commit clear error in granting Worley's motion to suppress after determining that his statement * * * did not indicate consent to the search." Id. at 387.

{¶12} Here, the trial court quoted from *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 93 S.Ct. 2041, and set forth the colloquy between defendant and the deputies that preceded defendant's statement, on which the state relies to argue defendant consented to let the deputies search his car. See Decision, at 3-4. Similar to *Worley,* the State in this case relied on defendant's statement to the police, "If that's what you guys want to do?" to establish that defendant gave consent, arguing the statement implied consent for the deputies to search defendant's car. The trial court found that "[t]he Defendant's answers [to the deputies' request to search his car] were clearly confusing and ambiguous" and the deputies "were either obligated to obtain clear consent or present an alternate justification for a warrantless search." The trial court noted that "[r]ather than taking the time to simply ask 'is that a yes' again, the deputies instead inferred consent, which is not permissible." (Decision at 4.) The trial court ultimately concluded "[u]pon careful review and consideration * * * the State failed to establish that the Defendant unequivocally, specifically and intelligently consented to a warrantless search of his vehicle." Id. at 4.

{¶13} The trial court's ruling that "the State failed to establish that the Defendant unequivocally, specifically and intelligently consented to a warrantless search of his vehicle" is not error. Id. at 4. Initially, the trial court did not legally err to the extent it relied upon the Sixth Circuit's decision in *Worley*, for the proposition that consent must be "unequivocally, specifically, and intelligently given." "[T]he decisions of the Sixth Circuit Court of Appeals are authoritative, as to questions of federal law." *State v. Halczyszak* (1986), 25 Ohio St.3d 301, 316 (Celebreeze, J., concurring in part and dissenting in part) (considering exception to Fourth Amendment warrant requirement);

State v. Glover (1978), 20 Ohio App.3d 283, 286 (finding Sixth Circuit Court of Appeals decisions on Fourth Amendment issues to be persuasive).

{¶14} Moreover, the trial court essentially determined the State did not meet its high burden of proof to show by "clear and positive" evidence that defendant's statement to the deputies, "If that's what you guys want to do," constituted consent. The state did not argue that defendant "explicitly" gave consent in the statement; the State argued that consent could be implied from the statement, meaning that the State had an even "heavier burden" to establish consent in this case. See *Holsinger,* supra. Despite the trial court's failure to articulate the factors and make an express determination on the issue of "voluntariness," the trial court recognized the proper tests and standards to be applied in determining whether defendant consented to the search.

{¶15} Indeed, if defendant's statement did not give "consent," the trial court arguably did not need to determine whether defendant made the statement as the result of coercion or duress. If, however, we were to determine on appeal that issue under the total circumstances of this case, we would conclude, as did *Worley*, that the record contained no evidence of coercion. Nonetheless, as in *Worley*, defendant's final response to the deputies' request to search his car was not an unequivocal consent but "merely a response conveying an expression of futility in resistance to authority or acquiescing in the officers' request." *Worley* at 386.

{¶16} Finally, although the trial court erroneously concluded consent could not be implied, the error did not prejudice the State. Where consent is equivocal or to be implied, the state has a heavier burden to show that defendant actually consented. Even if the totality of the circumstances may be considered for purposes of implied

consent, the State here never relied on anything but defendant's purported consent. Since defendant's statement did not rise to the level of consent under the lower burden the State carries in attempting to prove actual consent, it necessarily does not meet the higher burden required of the State to prove implied consent.

{¶17} Since the trial court properly sustained the motion to suppress, we overrule the State's single assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT, J., concurs.
FRENCH, J., dissents

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FRENCH, J., dissenting.

{¶18} Being unable to agree with the majority, I respectfully dissent.

{¶19} As the majority recognizes, the trial court erroneously concluded that consent to search cannot be implied. See *State v. Holsinger* (Oct. 10, 2000), 10th Dist. No. 00AP-216 (noting that consent need not be explicitly given and may be deduced from the defendant's response to a search request). Despite this error of law, however, the majority affirms the trial court's decision to grant appellee's motion to suppress evidence stemming from the search of his car. I disagree and would reverse the trial court's judgment for legal error. See *State v. Luke*, 10th Dist. No. 05AP-371, 2006-Ohio-2306, ¶12 (stating that an appellate court can reverse a trial court for committing an error of law when deciding a suppression motion).

{¶20} The majority concludes that the trial court's error was non-prejudicial because the prosecution cannot meet the heavy burden that *Holsinger* requires to prove

that a person gave implied consent. Due to its erroneous view that implied consent is impermissible, the trial court did not even consider whether appellee gave this type of consent. Thus, I would leave that issue for the trial court on remand because it is in the best position to determine the credibility of the evidence after applying the correct law. See *State v. Chiodo*, 10th Dist. No. 01AP-1064, 2002-Ohio-1573.

{¶21} The majority also concludes that appellee's final response to the deputies' request to search merely constituted acquiescence to police authority. But the determination of whether a defendant was acquiescing to police, instead of voluntarily consenting to a search, requires consideration of the totality of the circumstances. See *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 227, 93 S.Ct. 2041, 2047-48. See also *Holsinger*, citing *Bustamonte*, 412 U.S. at 226, 93 S.Ct. at 2047 (recognizing that "[n]o single criterion is controlling" in determining whether a person voluntarily consented to a search). The following are important considerations: (1) the voluntariness of the defendant's custody; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found. *State v. Lattimore*, 10th Dist. No. 03AP-467, 2003-Ohio-6829, ¶14. The trial court did not consider any of these factors and, instead, based its decision on the incorrect premise that consent cannot be implied. Thus, I would also leave that matter to the trial court for consideration under the correct law on remand. *Chiodo*.

{¶22} Rather than adhering to *Bustamonte* and *Holsinger*, the trial court relied on *United States v. Worley* (C.A.6, 1999), 193 F.3d 380, 386, which indicated that

consent must be unequivocally, specifically, and intelligently given. But Ohio courts are "not bound by rulings on federal statutory or constitutional law made by a federal court other than the United States Supreme Court." *State v. Burnett*, 93 Ohio St.3d 419, 424, 2001-Ohio-1581. To be sure, federal decisions from these lower courts have "persuasive weight." Id., citing *State ex rel. Heller v. Miller* (1980), 61 Ohio St.2d 6, 8. The trial court erred by relying on *Worley* in a manner that disregarded binding precedent in *Bustamonte* and *Holsinger*, however. See *Burnett* at 424-31 (considering persuasive authority together with binding precedent). And, in any event, *Worley* is distinguishable because the court in that case considered the issue of consent to search under the totality of the circumstances, and, in finding that voluntary consent did not exist, it recognized that the search took place in the coercive atmosphere of an airport. Id. at 386-87.

{¶23} Because of the trial court's erroneous belief that consent cannot be implied, it suggested that the deputies needed to have obtained a "yes" response to their search request before they were allowed to search appellee's car. As noted, however, consent may exist without that direct answer. *Holsinger*. In fact, courts have concluded that a totality of circumstances established voluntary consent even though responses to search requests were inexact. See, e.g., *United States v. Baker* (C.A.7, 1996), 78 F.3d 1241, 1244-45 (concluding that, under the totality of the circumstances, a defendant voluntarily consented by responding to a search request with: " 'I don't care-you can if you want to' "), and *State v. Iacona* (Mar. 15, 2000), 9th Dist. No. CA 2891-M, judgment affirmed in 93 Ohio St.3d 83, 88, 2001-Ohio-1292 (concluding that the totality of the circumstances established that a person voluntarily consented by

responding to a search request with: " 'No. I don't care.' ") See also *State v. Lane*, 2d Dist. No. 21501, 2006-Ohio-6830, ¶40, quoting *United States v. Buettner-Janusch* (C.A.2, 1981), 646 F.2d 759, 764 (recognizing that " 'a search may be lawful even if the person giving consent does not recite the talismanic phrase: "You have my permission to search" ' ").

{¶24} For these reasons, I would sustain appellant's single assignment of error, reverse the trial court's judgment, and remand the matter for further proceedings. Because the majority does not, I respectfully dissent.